A

PP

v.

DENISH MADHAVAN

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CRIMINAL APPEAL NO: 05-72-2005]

C

11 FEBRUARY 2010

CRIMINAL PROCEDURE: *Revision - Application for - Trafficking in dangerous drugs - Admissibility of oral confession - Reliance on confession - Whether had no bearing on court's finding that accused had possession*

D

of drugs - Indication by prosecution of provision relied upon to prove possession, whether necessary - Whether accused suffered any injustice - Rules of the Federal Court 1995, r. 137 - Evidence Act 1950, s. 27(1)

CRIMINAL PROCEDURE: *Trial - Prosecution's case - Evidence adduced by prosecution - Indication by prosecution of provision relied upon*

E

to prove possession, whether necessary - Evidence Act 1950, s. 27(1)

EVIDENCE: *Confession - Statements made to customs officer - Admissibility of - Reliance on confession - Whether had no bearing on court's finding that accused had possession of drugs*

F

The applicant/accused was sentenced to death by the High Court after being found guilty of trafficking in dangerous drugs under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). The conviction and sentence were later set aside and substituted with a

G

conviction for possession of drugs and the accused was sentenced to 15 years' imprisonment and ten lashes of the rotan under s. 39A(2) of the DDA by the Court of Appeal. The Federal Court, upon appeal by the Public Prosecutor, reversed the Court of Appeal's decision and reinstated the High Court's decision. In seeking for his

H

conviction to be reviewed pursuant to powers under r. 137 of the Rules of the Federal Court 1995 ('Rules'), the accused contended that: (i) the Federal Court had erroneously relied on his oral confession when the prosecution had clearly indicated to the Federal Court that it was not relying on that oral confession; and (ii)

I

during the trial at the High Court, the prosecution did not in any way indicate that it was relying on s. 27(1) of the Evidence Act 1950 ('Act') to prove possession.

Held (dismissing the application)
Per Zaki Tun Azmi CJ delivering the judgment of the court:

(1) The Federal Court judge was right in concluding that the accused's oral statements had been properly admitted. According to counsel for the accused, the DPP had abandoned his reliance on the confession. The DPP, on the other hand, said that the confession that he had abandoned was the confession made after the discovery of the drugs. In this court's opinion, whether the confession was admitted or not and as to which confession he referred to would not change the findings by the Federal Court that the cannabis was in the accused's possession. (paras 4, 5 & 6)

(2) A party adducing evidence need not at every stage of the trial indicate as to which provision in the Act he is relying upon. He does so only if there is an objection as to the admissibility of any statement or evidence. Otherwise, the trial will never be able to progress. Section 27(1) of the Act allows a statement made while the accused is in custody to be admissible if it leads to the discovery of any fact although it amounts to a confession. The judgment of the Federal Court judge pointed out that it was the accused who brought out the bags containing the cannabis from under the bed. No statement needed to be relied upon to prove this leading by the accused to the bags found. If counsel did not recognise under which provision the evidence was adduced, then it was his fault. (para 7)

(3) Since there was no injustice caused to the accused, this was not a fit and proper case for this court to exercise its inherent jurisdiction to make any order for the case to be reviewed and it did not warrant the invocation of r. 137 of the Rules. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon/tertuduh telah dikenakan hukuman mati oleh Mahkamah Tinggi setelah didapati bersalah mengedar dadah berbahaya di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Sabitan dan hukuman tersebut kemudiannya dibatalkan dan digantikan dengan suatu sabitan untuk milikan dadah dan tertuduh telah dihukum 15 tahun pemenjaraan dan sepuluh sebatan rotan di bawah s. 39A(2)

A ADB oleh Mahkamah Rayuan. Mahkamah Persekutuan, atas rayuan oleh Pendakwa Raya, membatalkan keputusan Mahkamah Rayuan dan menghidupkan semula keputusan Mahkamah Tinggi. Dalam menuntut untuk sabitannya disemak semula mengikut kuasa-kuasa di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995
B ('Kaedah-kaedah'), tertuduh mendakwa bahawa: (i) Mahkamah Persekutuan telah khilaf bergantung pada pengakuan lisannya apabila pendakwaan telah menandakan dengan jelas kepada Mahkamah Persekutuan bahawa ia tidak bergantung pada pengakuan lisan tersebut; dan (ii) semasa perbicaraan di Mahkamah Tinggi,
C pendakwaan tidak dalam mana-mana cara pun menandakan bahawa ia bergantung pada s. 27(1) Akta Keterangan 1950 ('Akta') untuk membuktikan milikan.

Diputuskan (menolak permohonan)

D **Oleh Zaki Tun Azmi KHN menyampaikan penghakiman mahkamah:**

(1) Hakim Mahkamah Tinggi betul apabila memutuskan bahawa pernyataan-pernyataan lisan tertuduh telah diterima dengan betul. Mengikut peguam tertuduh, TPR telah membiarkan
E pergantungannya atas pengakuan tersebut. TPR, sebaliknya, berkata bahawa pengakuan yang beliau telah membiarkan ialah pengakuan yang dibuat selepas penemuan dadah tersebut. Pada pendapat mahkamah ini, sama ada pengakuan tersebut telah diterima atau tidak dan mengenai pengakuan mana beliau
F merujuk tidak akan mengubah dapatan-dapatan oleh Mahkamah Persekutuan bahawa kanabis tersebut berada dalam milikan tertuduh.

(2) Sesuatu pihak yang mengemukakan keterangan tidak perlu pada
G setiap peringkat perbicaraan menandakan peruntukan mana Akta yang beliau bergantung pada. Beliau berbuat demikian hanya jika ada bantahan tentang kebolehterimaan mana-mana pernyataan atau keterangan. Kalau tidak, perbicaraan tidak akan dapat diteruskan. Seksyen 27(1) Akta membenarkan suatu
H pernyataan yang dibuat semasa tertuduh berada dalam jagaan boleh diterima jika ia membawa kepada penemuan apa-apa fakta walaupun ia merupakan suatu pengakuan. Penghakiman hakim Mahkamah Tinggi menunjukkan bahawa ia merupakan tertuduh yang telah membawa keluar beg-beg yang mengandungi kanabis
I dari bawah katil. Tidak ada pernyataan yang perlu digantung pada untuk membuktikan pembawaan oleh tertuduh kepada beg-

beg yang dijumpai. Jika peguam tidak mengecam di bawah peruntukan mana keterangan telah dikemukakan, itu merupakan silapnya sendiri.

(3) Oleh kerana tidak ada ketidakadilan terhadap tertuduh, ini bukan merupakan kes yang layak dan patut bagi mahkamah ini untuk menggunakan bidang kuasa sedia adanya untuk membuat apa-apa perintah untuk menyemak semula kes dan ia tidak mewajarkan penggunaan k. 137 Kaedah-kaedah.

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC ***(refd)***

Chancery Lane Safe Deposit and Offices Co Ltd v. Inland Revenue Commissioners [1966] AC 85 ***(refd)***

Fitzleet Estates Ltd v. Cherry (Inspector of Taxes) [1977] 1 WLR 1345 ***(refd)***

Nash v. Tamplin & Sons Ltd [1952] AC 231 ***(refd)***

PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***

Radcliffe v. Ribble Motor Services Ltd [1939] AC 215 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 39A(2), 39B(2)

Evidence Act 1950, s. 27(1)

Rules of the Federal Court 1995, r. 137

For the appellant - Hisyam Teh Poh Teik (Gurbachan Singh, Rajpal Singh, Edmund Bon Tai Soon, Amer Hamzah Arshad, Subramanian Nair, Nik Mohamed Ikhwan Nik Mohamed with him); M/s Teh Poh Teik & Co

For the respondent - Wong Chiang Kiat (Nurulhuda Nur'aini Mohd Nor with him) DPPs

Reported by Suresh Nathan

JUDGMENT

Zaki Tun Azmi CJ:

[1] The applicant (in this judgment will be referred to as the accused) was charged for trafficking of drug under s. 39B(2)[1] of the Dangerous Drugs Act 1952 ('DDA') which carries the death penalty. He was found guilty by the High Court. The conviction and sentence were later set aside and substituted with a conviction for the offence of possession of drugs and the accused was sentenced to 15 years imprisonment and ten lashes of the rotan under s. 39A(2)[2]

A DDA by the Court of Appeal. Afterwards, the Public Prosecutor appealed to the Federal Court. The Federal Court reversed the decision of the Court of Appeal and reinstated the decision of the High Court.

B **[2]** In seeking for his conviction to be reviewed pursuant to powers under r. 137[3] of the Rules of the Federal Court 1995, the accused has two complaints. He does so on the grounds that:

a) The Federal Court had erroneously relied on the oral confession of the accused when the prosecution had clearly indicated to the Federal Court that it was not relying on that oral confession; and

C

b) That during trial at the High Court, the prosecution did not in any way indicate, that it was relying on s. 27(1) of the Evidence Act 1950 ('Evidence Act') to prove possession.

D

[3] It is not necessary for me to go into the facts of the case as it is well laid out in the grounds of judgment of the High Court, Court of Appeal and Federal Court[4].

E

[4] We have studied the grounds of judgment of all the three courts, in particular the impugned grounds of judgment of this court delivered by Abdul Aziz Mohamad, FCJ. The first issue was with regard to the admission of the accused's oral statements made to Raja Abdul Aziz (PW4) and was later admitted after the trial-within-a-trial. According to the judgment, this was based on the submission of the respondent's counsel. He held that the statements were properly admitted. He said:

F

> We are not persuaded by the submission to hold that the statements were improperly admitted. In our judgment, they were. The statement about the cannabis being under the bed meant that the respondent knew of the existence of the cannabis in his bags. The learned trial judge was therefore right on finding that the respondent was in possession of the cannabis.

G

H **[5]** We agree with the conclusion of the learned Federal Court Judge above.

[6] According to the learned counsel for the accused (who also acted for the respondent in that appeal at this court, the Court of Appeal and the High Court), the learned DPP had abandoned his

I

reliance on the confession. The learned DPP on the other hand said that the confession that he had abandoned was the confession made after the discovery of the drugs. In our opinion, whether the confession is admitted or not and as to which confession he referred to, would not change the findings by the Federal Court that the cannabis was in the possession of the accused. This is clear from the following words of the Abdul Aziz Mohamad, FCJ when he continued to say:

> We will go a step further and say that, even were the respondent's statement to be overlooked, the fact that the respondent, in the circumstances that obtained, brought out from under the bed the bags containing the cannabis was itself sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bags and was therefore in possession of it. With such proof of knowledge, it is unavailing as a defence to suggest that the presence of the cannabis in the respondent's bags was the result, unknown to the respondent, of the work of someone who had access to the house and the respondent's room.

[7] The second issue is that during prosecution, the prosecution failed to indicate to the court that he was relying on s. 27(1)[5] of the Evidence Act. A party adducing evidence, need not at every stage of the trial indicate as to which provision in the Evidence Act he is relying upon. He does so only if there is an objection as to the admissibility of any statement or evidence. Otherwise, the trial will never be able to progress if he has at every stage and every statement to say which provision of the Evidence Act is applicable. Section 27(1) of the Evidence Act allows a statement made while the accused is in custody to be admissible if it leads to the discovery of any fact although it amounts to a confession. Again, Abdul Aziz Mohamad, FCJ's judgment pointed out that it was the accused who brought out from under the bed the bags containing the cannabis. No statement need to be relied upon to prove this leading by the accused to the bags found. If the counsel did not recognise under which provision the evidence was adduced, then it was his fault.

[8] This issue does not involve admissibility of evidence. If it had been so, then in a criminal case (particularly evidence adduced by the prosecution), whether it is objected to or not, it remains inadmissible even if it had not been objected. In a civil case, failure to object may be construed as admission of fact by the opposing party.

[9] The instances when the court will exercise its discretion under r. 137 of the Rules of the Federal Court 1995 are quite well established and I do not need to cite those authorities. It can be relied upon for any decision of the Federal Court to be reviewed only if the court is satisfied that on the face of the record it is obvious that there had been injustice. The Federal Court must be satisfied that the decision sought to be reviewed has resulted in an injustice.[6]

[10] In *Fitzleet Estates Ltd v. Cherry (Inspector of Taxes)*[7], Lord Wilberforce said the following regarding review of House of Lord's decisions:

> My Lords, in my firm opinion, the Practice Statement of 1966 was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, **after a decision has been given by this House with all appearance of finality,** to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.
>
> (emphasis added)

[11] I reproduce the Practice Statement of 1966 as follows:

> Lord Gardiner LC: Their Lordships regard the use of precedent as an indispensible foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.

[12] *Fitzleet Estates Ltd v. Cherry (Inspector of Taxes)* involves issues on whether interest charged on a loan by the company is taxable. In the earlier case of *Chancery Lane Safe Deposit and Offices Co. Ltd. v. Inland Revenue Commissioners*[8], the majority of the House of Lords decided that a certain provision of the Income Tax Act 1952 applied while two members dissented. In the *Fitzleet Estates* case, the appellant challenged the *Chancery Lane* case (delivered 11 years earlier) and invited the House of Lords to depart from its earlier decision based on the practice statement cited above. It was in this context that Lord Wilberforce disagreed to permit a litigant to return to the House hoping that a differently constituted panel would be persuaded to take the view that its predecessors rejected. According to him, there must be a finality. In England, there has been a reluctance to review any well set principles[9].

[13] I realise that the *Fitzleet Estates* case deals with review of settled principles of law while r. 137 deals with the power to review its own decision if it is satisfied that there had been injustice. For every case, there must be a finality. Against finality is the issue of whether there had been an injustice. Justice and injustice is very wide and more often than not, subjective.

[14] We have therefore to look into this case with that in mind ie, whether there had been any injustice caused to the accused. Since we find that there had been no injustice, we therefore find that this is not a fit and proper case for this court to exercise its inherent jurisdiction to make any order for the case to be reviewed and that it does not warrant the invocation of r. 137 of the Rules of the Federal Court 1995.

[15] We therefore dismiss this application. As decided by this court in the appeal proper, the conviction and sentence of the High Court are confirmed.

A **Endnotes:**

1. Section 39B (2) DDA – Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

B 2. 39A(2) DDA – Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is – (a)-(z) shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five
C years, and he shall also be punished with whipping of not less than ten strokes.

3. Rule 137 Rules of the Federal Court 1995 – For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear
D any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

4. [2009] 2 CLJ 209.

5. Section 27(1) of the Evidence Act 1950 – When any fact is deposed to as discovered in consequence of information received from a person
E accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

6. See *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 and *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833.
F

7. [1977] 1 WLR 1345

8. [1966] AC 85; [1966] 2 WLR 251; [1966] 1 All ER 1, HL (E)

9. See *Radcliffe v. Ribble Motor Services Ltd.* [1939] AC 215; [1939] 1 All ER 637, HL (E) and *Nash v. Tamplin & Sons Ltd.* [1952] AC 231; [1951] 2 All ER 869, HL (E).
G

H

I